UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SCOTT R. PETERSON, Appellant, v. DEPARTMENT OF TRANSPORTATION, Agency.	DOCKET NUMBER CH07529110024 DATE: MAY 22 1992

Phillip Wood, Esquire, Aurora, Illinois, for the appellant.

Virginia C. Costello, Des Plaines, Illinois, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board upon the appellant's petition for review of the February 12, 1991 initial decision that sustained his removal. For the reasons discussed below, the Board DENIES the appellant's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still sustaining the removal.

BACKGROUND

On October 11, 1990, the appellant filed a timely appeal from his September 25, 1990 removal from the position of Air Traffic Control Specialist at the agency's Chicago-Meigs Air Traffic Control Tower (ATCT) in Chicago, Illinois, based on a charge of unexcused or unauthorized absence from duty from July 9, 1990, to August 21, 1990. The agency took the action after the appellant failed to return to work, as scheduled, from his vacation in Australia, and allegedly failed to submit adequate medical documentation to support his allegation that he was incapacitated for work during his absence. *See* Appeal File, Tab 1 and Tab 4, Subtabs B and D. On appeal, the appellant contended that the removal action was improper because he had provided adequate medical documentation for his absence and that the removal action was taken in reprisal against him for whistleblowing activities in submitting to an equal employment opportunity (EEO) investigator a statement regarding a sexual harassment and sex discrimination complaint filed by a female employee and in allegedly reporting racist statements. He also argued that the penalty of removal was unduly harsh. *Id.* at Tabs 1, 6, and 9, Exhibits I, K.

In a February 12, 1991 initial decision, the administrative judge sustained the agency's action. She noted that, of four Standard Form (SF) 71s that the appellant submitted as medical documentation, two preceded his July 9, 1990 conversation with Bruce Metz, his supervisor and the proposing/deciding official, and that his physician did not

indicate on those forms that the appellant was unable to fly or was incapacitated for work. See Initial Decision at 2-3. As to the two remaining SF-71s, the administrative judge found a July 20, 1990 SF-71 listed the medication prescribed, and certified that the appellant was incapacitated for duty from June 30, 1990, to July 20, 1990, because of otitis media (an ear infection) and was unable to fly during that period. Thus, she found that the agency's denial of sick leave for that period was unreasonable. *Id.* at 3-4. The administrative judge found, however, that the appellant failed to submit sufficient medical documentation to support his absence from July 21, 1990, to August 21, 1990, because a July 21, 1990 SF-71 he presented as medical evidence did not indicate that he was incapacitated for work or was unable to fly during that period. *Id.* at 3. She noted that the appellant had flown from Australia to Seattle, Washington, by August 5, 1990. *Id.* at 4. She rejected the appellant's argument that prescribed medication he was allegedly taking precluded him from performing his duties, finding that it was the Flight Surgeon's responsibility to excuse him from duties based on this reason. *Id.* Thus, she found that the appellant was AWOL from July 21, 1990, to August 21, 1990, and that the agency therefore supported its charge by preponderant evidence. *Id.* at 4-5.

As to the appellant's allegation of reprisal for whistleblowing activities, the administrative judge found that the appellant's allegation of sexual harassment relating to

"an offensive reference to a female controller in a word game on a computer screen" did not establish sexual harassment and that the employee responsible for the reference was counselled. *Id.* at 5. As to the racial discrimination statement, the administrative judge found that the appellant's allegation in a June 1990 affidavit stating that he overheard employees at the O'Hare ATCT in Chicago, Illinois, expressing their intention to fail a black controller was not credible because the appellant refused to identify the employees involved. *Id.* at 6. The administrative judge concluded that the appellant failed to show that retaliation was a contributing factor in his removal because he did not show that either Metz, or the Traffic Manager for the O'Hare ATCT, "Mr. Coker" (acting through Metz), was involved in the alleged incidents or had direct knowledge of their occurrence. *Id.*

The administrative judge found that removal was an appropriate penalty and that it promoted the efficiency of the service. In this regard, she considered the following factors: (1) The inherent connection of AWOL to the efficiency of the service; (2) the lengthy period of AWOL involved (1 month); (3) the fact that the agency had placed the appellant on notice that he was AWOL and that his failure to submit adequate documentation of his inability to work would result in his removal; (4) the agency's table of penalties, which provided for a 10-day suspension to removal for a first offense of AWOL in excess of 5 days; (5) the appellant's relatively short period of employment with the

agency (5 years); and (6) the appellant's lack of potential as a good candidate for rehabilitation as demonstrated by his history of leave manipulation for his own purposes without regard to the agency's need for an available workforce. *Id.* at 6-9. Therefore, the administrative judge sustained the removal.

In his timely petition for review, the appellant challenges the administrative judge's finding that the agency supported the AWOL charge by preponderant evidence. He also challenges the appropriateness of the penalty, contending that the administrative judge raised and considered arguments for the agency and that the deciding official did not consider the mitigating factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). The agency has responded in opposition to the petition for review.

ANALYSIS

The appellant has not supported his allegations of error by the administrative judge in sustaining the AWOL charge.

In his petition for review, the appellant merely disagrees with the administrative judge's findings and conclusions. The appellant's mere disagreement with the administrative judge's findings does not warrant a full review of the record by the Board. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam); *Taylor v. United States Postal Service*, 41 M.S.P.R. 374, 378 (1989). The July 21, SF-71, that the appellant presented to support his allegation

of incapacitation for duty from July 21, 1990, to August 21, 1990, states his diagnosis, prognosis, and expected return date to work, and lists his medications. *See* Appeal File, Tab 9, Exhibit E. The documentation, however, does not indicate that the appellant was unable to fly or that he was incapacitated for duty during that period. *See id.* Nevertheless, the appellant refused to comply with Metz's request for additional medical documentation on the basis that the four SF-71s he had submitted were sufficient medical documentation for his absences. *See, e.g., id;* Hearing Transcript at 34-35. The appellant points to no evidence of record to show that he complied with his supervisor's request for additional medical documentation. Neither does he establish that he was unable to provide the documentation requested for his July 21, 1990, to August 21, 1990 absence or that the request was otherwise unreasonable.

We note the appellant's contention that the medical documentation he provided was sufficient under chapter 75 of the applicable collective bargaining agreement (CBA), a copy of which he submitted below, and that the administrative judge did not consider the CBA. *See* Petition for Review (PFR) at 24. Chapter 75 of the CBA merely provides that any provision of the CBA "shall be determined a valid exception to, and shall supersede any existing or future Employer rules, regulations, orders and practices which conflict with the Agreement." *See* Appeal File, Tab 9, Exhibit A. The appellant does not explain how the agency violated applicable provisions

of the CBA. Therefore, he has shown no error by the administrative judge in not specifically referring to the CBA. *See Weaver*, 2 M.S.P.R. at 133-34; *Taylor*, 41 M.S.P.R. at 378. The administrative judge erred by characterizing the appellant's reprisal allegations as whistleblowing activities.

We note that the administrative judge characterized the appellant's allegations of reprisal for allegedly providing information regarding sex and racial discrimination as "whistleblowing" activities and analyzed the appellant's allegations under the Whistleblower Protection Act (WPA), Pub. L. No. 101-12, 103 Stat. 16 (1989). *See* Initial Decision at 5-6. In *Williams v. Department of Defense*, 46 M.S.P.R. 549, 552-54 (1991), the Board held that only personnel actions alleged to have been taken in reprisal for activities described in 5 U.S.C. § 2302(b)(8) were covered by the WPA. Thus, in the instant case, we find that the appellant's EEO activities did not constitute whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) and that the administrative judge erred by analyzing the appellant's reprisal allegations under the WPA.

Nevertheless, we find that the administrative judge's error did not prejudice the appellant's substantive rights because we concur in the administrative judge's ultimate conclusion that the appellant failed to show that the agency's action was taken in retaliation for his EEO activities. In order to prevail on a contention of reprisal, an appellant has the burden of showing that: (1) A protected disclosure was

made; (2) the accused official knew of the disclosure; (3) the adverse action under review could have been retaliation under the circumstances; and (4) after careful balancing of the intensity of the motive to retaliate against the gravity of the misconduct, a nexus is established between the adverse action and the motive. *Haine v. Department of the Navy*, 41 M.S.P.R. 462, 472 (1989).

The appellant's reports of alleged sex and race discrimination constituted protected EEO activities under 5 U.S.C. § 2302(b)(9). *See, e.g., Guthrie v. United States Postal Service*, 41 M.S.P.R. 102, 108 (1989); *Mingoia v. United States Postal Service*, 33 M.S.P.R. 169, 173 (1987). In addition, it is undisputed that Mr. Metz knew of the protected activities. *See* Hearing Transcript at 38-40. Nevertheless, Mr. Metz was not accused of involvement in any of the alleged acts of prohibited discrimination. Under these circumstances, we find that the appellant failed to show that the adverse action could have been in retaliation for his protected activities. Therefore, we find that the appellant failed to prove his allegation of reprisal. *See Haine*, 41 M.S.P.R. at 472.[1]

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[1] We note that the administrative judge failed to advise the appellant of his right to seek review of the Board's final decision by the Equal Employment Opportunity Commission and by an appropriate United States district court. Because the appellant alleged that his removal resulted from retaliation for engaging in EEO activities, this omission was error. Information regarding those rights, however, is included below. *See Guthrie*, 41 M.S.P.R. at 108.

The penalty of removal was reasonable.

As to the appropriateness of the penalty, we find that the administrative judge thoroughly addressed that issue, considering the relevant mitigating factors under *Douglas*. The appellant contends that the administrative judge raised and considered arguments not made by the agency regarding the agency's table of penalties and unrelated leave periods for which the appellant had received approved leave. *See* PFR at 26-28. The appellant has not shown error by the administrative judge in this regard. The agency's table of penalties was a part of the record and the consistency of the penalty imposed with the agency's table of penalties was a relevant factor for the administrative judge to consider in determining the appropriateness of the penalty. *See Douglas*, 5 M.S.P.R. at 305. Likewise, the appellant's history of requesting additional leave after receiving approved vacation leave was a matter of record and was relevant to determining the appellant's potential for rehabilitation and his work dependability, factors that were proper for the administrative judge to consider in determining the reasonableness of the penalty. *Id.*

The appellant also contends that the deciding official failed to consider the relevant *Douglas* mitigating factors. *See* PFR at 20, 26. We note that there is no indication in the proposal or decision notice, or in the testimony of the proposing/deciding official, to indicate that he considered mitigating factors. *See* Appeal File, Tab 4, Subtabs B and D;

Hearing Transcript at 14-106. The appellant, however, has not shown harmful error in this regard. *See Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983) (reversal of an action is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984). Rather, the record shows that the administrative judge reviewed the removal penalty, consistent with *Douglas*, 5 M.S.P.R. at 305-06, to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. The administrative judge considered the relevant mitigating factors, finding that the removal penalty was within the bounds of reasonableness. The appellant has not identified any significant mitigating factors that the agency should have considered and that the administrative judge ignored.[2] *See Spearman v. United States Postal Service*, 44 M.S.P.R. 135, 141 (1990); *Gleason v.*

[2] We note the appellant's contention that, in determining the appropriateness of the penalty, the administrative judge failed to consider the fact that she sustained only 40 percent of the AWOL charge. *See* PFR at 29. The administrative judge erroneously referred to the sustained specifications as "charges," inasmuch as there was only one charge, AWOL, that was supported by several specifications of absences. *See* Initial Decision at 7; Appeal File, Tab 4, Subtab D. This error, however, did not prejudice the appellant's rights. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision). We concur in the administrative judge's ultimate determination that the period of AWOL sustained, 1 month, warranted removal in light of the other relevant *Douglas* factors presented in this appeal.

Department of the Army, 38 M.S.P.R. 547, 550 (1988). Therefore, the appellant has not shown that the agency's failure to specifically refer to mitigating factors constituted harmful error. *See Baracco*, 15 M.S.P.R. at 123.[3]

ORDER

This is the Board's final order in this appeal. *See* 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your

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[3] Also, we note that the appellant has submitted several documents with his petition for review. He has not alleged that they are based on new and material evidence, however, and our review of the documents indicates that they were already a part of the record below at Appeal File, Tab 4, Subtab E. The appellant therefore has not established that those documents constitute a basis for full review of the record. *See Matlock v. Department of the Army*, 42 M.S.P.R. 351, 355 (1989), *review dismissed*, 904 F.2d 44 (Fed. Cir. 1990); *Meier v. Department of the Interior*, 3 M.S.P.R. 247, 256 (1980).

representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar-days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.